APPEAL NO. 020305
FILED MARCH 11, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 9, 2002. The hearing officer determined that the first certification of maximum medical improvement (MMI) assigned by Dr. S, on January 16, 2001, became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)). The hearing officer also determined that the impairment rating (IR) assigned by Dr. S is not valid, as Dr. S did not follow the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association when assessing the IR. The appellant (claimant) appeals the decision that the certification of MMI became final, arguing that where an IR is determined to be invalid, the MMI date is also invalid. The respondent (carrier) replies, first asserting that the claimant's appeal is untimely, then urging affirmance of the hearing officer's determination that the first certification of MMI became final.

DECISION

Reversed and rendered.

As to the carrier's assertion that the claimant's appeal is untimely, we refer the carrier to Section 410.202(d), amended effective June 17, 2001, to provide that Saturdays, Sundays, and holidays listed in Section 662.003, Government Code, are not included in the computation of the time in which a request for an appeal must be filed. The assertion of untimeliness is without merit.

On _____, the claimant sustained a compensable injury. Dr. S, the carrier-selected required medical examination doctor, examined the claimant on January 16, 2001; certified that the claimant reached MMI on that date; and assigned the claimant a five percent IR. With regard to the disputed issue, the hearing officer determined that this first certification of MMI became final under Rule 130.5(e), based on the hearing officer's determination that the claimant did not dispute the first certification of MMI within 90 days after written notification of the MMI certification was sent by the Texas Workers' Compensation Commission (Commission) to the claimant.

We had occasion to discuss the effect of a recent Texas appeals court decision on Rule 130.5(e) in Texas Workers' Compensation Commission Appeal No. 020014-s, decided February 26, 2002. We first quoted the original Rule 130.5(e), then we quoted the amended version of Rule 130.5(e), effective _____, and finally noted that this rule was repealed effective January 2, 2002. We then said:

> In Fulton v. Associated Indemnity Corporation, 46 S.W.3d 364 (Tex. App.-Austin 2001, pet. denied), the court determined that the original version of Rule 130.5(e), the 90-day rule, which restricted the time period for disputing

> an IR, implicitly limited a claimant's time period for revisiting the assessment of MMI, because when the IR became final, so did the determination of MMI. With respect to the original version of Rule 130.5(e), the court held that: (1) because Rule 130.5(e) severely restricts the statutory time period for assessing a final MMI, the Commission exceeded its authority in enacting the rule; (2) the rule is arbitrary and invalid because it impermissibly shortens the statutory time period allotted to an injured worker to achieve MMI; (3) Section 401.011(30) establishes a 104-week deadline for a worker to achieve MMI, and the Commission may not, by rule, shorten this statutory period because to do so would impose restrictions in excess of those imposed by the 1989 Act; (4) Rule 130.5(e) is invalid to the extent it prevents a reassessment of MMI because the IR or MMI was not disputed within 90 days; and (5) Rule 130.5(e) imposed on Fulton a restriction in excess of that found in the plain language of the 1989 Act and that Fulton's MMI certification, and therefore, his IR, did not become final.
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> The amended Rule 130.5(e) is the version of Rule 130.5(e) that is applicable to the case under consideration. As noted in footnote 9 on page 371 of the Fulton decision, the original Rule 130.5(e) *implicitly* limited MMI disputes whereas the amended Rule 130.5(e) *explicitly* limits the time for disputing MMI certification as well as IRs. In our opinion, the reasons stated in the Fulton decision for holding the original Rule 130.5(e) invalid also apply to the amended Rule 130.5(e). [Emphasis in original.]

Applying the Fulton decision and our rationale in Appeal No. 020014-s, we reverse the hearing officer's decision that the first certification of MMI assigned by Dr. S on January 16, 2001, became final under Rule 130.5(e), and render a decision in this case that the first certification of MMI as certified by Dr. S did not become final. In view of this disposition of the appealed issue, we find it unnecessary to further address the claimant's argument that where an IR is determined to be invalid, the MMI date is also invalid. Under the Fulton decision, in the circumstances present in this case, neither the first certification of MMI nor the five percent IR became final.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

Michael B. McShane
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge